No. 2381

In the United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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STATEMENT.

This action was brought by the United States to recover from the defendant $1,500 in penalties for three alleged violations of section 2 of the act of Congress approved March 4, 1907 (34 Stat. L., p. 1415), commonly known as the Federal Hours of Service Act.

That part of section 2 of this act, having reference to employees engaged in train service, reads as follows (the italics are ours and indicate that provision of this section the defendant is charged with having violated):

> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject

> to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employees of such common carrier shall have been concontinuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; *and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.*

The complaint filed by the Government was in three counts, the first having reference to the employment of Conductor Thomas Doyle, and reads as follows (Rec., p. 3–4):

> Plaintiff alleges that said defendant is and was, during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.
>
> Plaintiff further alleges that in violation of the act of Congress, known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Stat. L., p. 1415), said defendant, having required and permitted its certain conductor and employee, to wit, Thomas Doyle, to be and remain on duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, with-

in the jurisdiction of this court, for 16 hours in the aggregate during the 24-hour period beginning at the hour of 1.10 o'clock p. m. on May 12, 1913, to wit, from said hour of 1.10 o'clock p. m. on said date to the hour of 12.30 o'clock a. m. on May 13, 1913, and from the hour of 6.55 o'clock a. m. on May 13, 1913, to the hour of 11.15 o'clock a. m. on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1 o'clock p. m. on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said act of Congress said defendant is liable to plaintiff in the sum of $500.

The remaining counts are similar to the first in every respect, except that the second count has reference to the employment of Brakeman B. L. Eddy and the third to Brakeman W. D. Edgerton.

The defendant filed its answer and admitted the allegations of each count "save and except the allegations that said employee while required and permitted to remain and continue on duty as aforesaid

was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to plaintiff in the sum of $500, which said allegations are denied."

The defendant attempted to bring itself within the proviso of section 3 of the act, and with this object in view set up in its answer certain facts as constituting an affirmative defense as to all counts. (Rec., pp. 7–10.) While this answer was undoubtedly demurrable, the plaintiff was content to allow the defendant to show any affirmative defense it might desire regardless of the character of the answer. This answer is not here set forth in detail, but the contentions of the defendant will fully appear in this statement of the case.

The facts adduced at the trial show that the employees in question had been for some time engaged in the operation of two of defendant's passenger trains running between Tacoma and Portland.

One of these trains was known as No. 303, scheduled to leave Tacoma at 1.40 p. m. and to arrive at Portland at 6.45 p. m. the same day. Under the rules of the company the conductor and brakemen were required to report for duty 30 minutes prior to the time set for departure of No. 303; this was known as preparatory time. (Rec., p. 18.)

It will thus be seen that counting both the preparatory and scheduled running time of this train, these employees ordinarily would be on duty, if the train maintained its schedule, 5 hours and 35 minutes before going off duty at Portland.

The second train was known as No. 308, scheduled to leave Portland at 7.25 a. m. and to arrive at Tacoma at 12.35 p. m. the same day. The same preparatory service was required of these employees in connection with this train as in the case of No. 303. (Rec., p. 18.)

Counting both the preparatory and scheduled running time of No. 308, the employees thereon would, if the train maintained its schedule, be on duty 5 hours and 40 minutes.

On May 12, 1913, the employees in question reported for work at 1.10 p. m. and left Tacoma in charge of No. 303 at 1.40 p. m. (Rec., p. 16.) At South Tacoma and near Lake View they were delayed approximately 4 hours and 35 minutes on account of the derailment of an O.-W. R. & N. train operating over the defendant's tracks, causing No. 303 to transfer its passengers around the wreck. (Rec., pp. 19–20.)

After completing the transfer of its passengers to another train, these employees proceeded in charge thereof to Portland. They left Lake View at 6.28 p. m., then having been on duty 5 hours and 18 minutes. (Rec., p. 23.)

The scheduled running time from Lake View to Portland was 4 hours and 40 minutes, but on account of traffic being disarranged No. 303 did not reach Portland and the employees did not go off duty until 12.30 the following morning, then having been on duty 11 hours and 20 minutes. (Rec., p. 20.)

Upon their arrival at Portland it was known to the officials of the company, or could easily have been ascertained, that if these same employees were required and permitted to return to duty the same morning at 6.55, and to proceed to Tacoma in charge of No. 308, they would be on duty 16 hours in the aggregate long before their train could reach Tacoma. (Rec., p. 24.)

No effort whatever was made by the defendant company to place another crew in charge of No. 308, either at Portland or at any place along the line where they had reason to believe the 16-hour period of aggregate service would expire. (Rec., pp. 24, 30.)

The initial terminal of No. 303 was Tacoma and its final terminal was Portland. (Rec., p. 26.)

The initial terminal of No. 308 was Portland and its final terminal was Tacoma. (Rec., p. 27.)

As there was no disputed fact for the jury both sides moved for a peremptory instruction, and the trial court thereupon directed the jury to find for the defendant on each cause of action. Judgment was thereafter entered by the court against the plaintiff and this action dismissed. (Rec., p. 12.)

The Government, plaintiff below, brings this case here upon a writ of error as to counts 1, 2, and 3 upon the following:

ASSIGNMENT OF ERRORS.

1.

The court erred in refusing to peremptorily instruct the jury to find for the plaintiff on the first, second,

and third causes of action of plaintiff's complaint, as was requested by counsel for plaintiff at the conclusion of the taking of testimony in the case. (Rec., p. 33.)

2.

The court erred in peremptorily instructing the jury to find for the defendant on the first, second, and third causes of action of plaintiff's complaint, which request for such peremptory instruction was made by counsel for defendant at the conclusion of the taking of testimony in the case. (Rec., p. 33.)

3.

The court erred in entering final judgment against the plaintiff and dismissal of this action. (Rec., p. 34.)

QUESTIONS INVOLVED.

1. Is any unavoidable accident a license to a carrier to disregard and ignore the provisions and requirements of the Federal Hours of Service Law?

2. If so, what are the limitations of such license and when does it cease to exist?

(*a*) *Does it apply to employees so delayed only until they reach a terminal, or the end of that run?*

(*b*) *Does it continue to apply to such employees even after they have reached a terminal, or end of that run, and have been relieved from duty?*

(*c*) *Does it continue to apply to them even after they have gone on duty again and have left a terminal and in charge of an entirely different train?*

3. In order to excuse itself for continuing in service employees who have already been permitted to be on duty 16 hours in the aggregate in a 24-hour period, is the carrier required to show any causal connection between a delay due to one of the causes set forth in the proviso and its failure to relieve such employees at or before the expiration of 16 hours of aggregate service?

ARGUMENT.

The proviso of section 3 reads as follows:

> *Provided,* That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

The questions involved in this case may be considered in a general discussion of this proviso with respect to the limitations it places upon the mandatory provisions of section 2 of the act.

Reading together that portion of section 2 under which this action was brought and the proviso, it seems clear that no "employee who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to *continue* * * * on duty without having had at least 8 consecutive hours off duty," unless the failure to relieve such employee is due to a casualty, or the like.

It was the theory of the defendant that when a train is delayed by some accident, clearly unavoid-

able, such delay operates as a license to the carrier to thereafter disregard the mandatory provisions of section 2 with respect to 16 hours' service. In other words, if the crew in question were delayed by a wreck on its southbound trip, a license authorizing excess service on their part would automatically attach to them; they could thereafter be relieved from duty and be required to return to duty again, with a vested right to continue them in service long after they had been on duty 16 hours, and without being under the slightest obligation to take even ordinary precautions to provide relief. But the great trouble with this defense is that if this so-called license extends from day to day, from one trip to another, there is no reason why it should not also extend to any number of trips; so that a wreck in June might operate to license excess service in July.

Train No. 303 was delayed at Lake View 4 hours and 35 minutes, which the Government admitted was due to an unavoidable accident; but such delay can not avail the defendant as an excuse for any future service required of an employee after he leaves a terminal.

For the sake of illustration, we will suppose that this train was delayed at Lake View 8 hours and 35 minutes, thereafter consuming the same amount of time in getting to Portland that it did at the time in question, so that on arrival there the crew would have been on duty approximately 15½ hours. They are then released from duty for two or three hours, after which they are required to return to duty for the ex-

press purpose of operating a train to Tacoma, well knowing that the crew must be on duty nearly six hours more before they can reach Tacoma; but in spite of this knowledge no effort is made to relieve the crew, either at Portland or by sending out a relief crew from Tacoma. On their arrival at Tacoma the crew have been on duty approximately 20 hours, but instead of relieving them at Tacoma the carrier requires them to continue on duty and return to Portland in charge of another train.

We can not conceive of a more deliberate and willful violation of both the letter and spirit of the law, for the situation last described is similar to the one involved, the difference being but one of degree; yet the only answer the defendant makes is that the wreck at Lake View closed its eyes to conditions and, therefore, was the direct cause of its failure to provide another crew at Portland or to send one out from Tacoma.

Such an argument is so elastic that it will fit almost any situation, and if allowed to prevail will excuse any neglect, oversight, or willful act on the part of the carrier.

Train No. 303, after leaving Lake View, might have been delayed by other wrecks, so that when it reached Portland, say at 6.55 a. m., the crew had been on duty 17 hours and 45 minutes, but instead of being relieved there they are required to operate No. 308 from Portland to Tacoma, and by the time they have finished this run their hours of service have covered a period

of 23 hours. Can it be said that such service would be justified or licensed by reason of the delays to No. 303 before it reached Portland?

There is no material difference between this hypothetical case and the one now under discussion.

In the first place, the employees leave Portland, "a terminal," with full knowledge on the part of the carrier that they *have been* on duty over 16 consecutive hours.

In the case under consideration, the employees left Portland, the same "terminal," with full knowledge on the part of the carrier that they *would be* on duty over 16 hours in the aggregate.

"This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected." (*U. S.* v. *K. C. S.* (C. C. A.), 202 Fed. Rep., 828.)

In order to excuse itself for an act, which otherwise would be a violation of the mandatory provisions of section 2, the carrier must bring itself strictly within the letter and reason of the proviso. As was said in *U. S.* v. *Dickson* (15 Pet., 141, 165), quoting from the opinion of Mr. Justice Story, "a proviso carves special exceptions only out of the enacting

clause, and those who set up such exception must establish it as being within the words as well as the reason thereof."

In an action for requiring more than 16 hours' service of an employee, either consecutive or aggregate, we do not believe the carrier can bring itself within the proviso simply by showing that somewhere on its journey the train on which that employee was on duty was delayed by reason of an unavoidable accident.

The carrier must go further than this and show, not only the delay to the train and the cause thereof, but also show a causal connection between such delay and its inability to comply with the requirements of the act. This phase of the case can be no better presented than by a reference to the case of *Newport News & Mississippi Valley Co.* v. *United States* (61 Fed Rep., 488). In delivering the opinion of the court, Lurton, then circuit judge, said:

> The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to cause not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty

only upon such carriers as "knowingly and willfully" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.

It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm" the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes * * *."

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence.

Did the defendant show any causal connection between the derailment near Lake View and the service required of the employees in question?

This question must be answered in the negative. The derailment occurred over 10 hours before No. 303 reached its final terminal, Portland, at which place the crew were relieved from duty, and over 16 hours before these same employees were required and permitted to return to duty again.

In other words, in answer to the Government's charge that it required more than 16 hours of aggregate service of certain employees, the defendant contended that there was a causal connection between this derailment, which occurred about 2 p. m., May 12, and its failure to relieve these employees at or before 11.15 a. m., the following day, at which time the employees had been on duty 16 hours in the aggregate. This was over 21 hours after the derailment occurred and approximately 17 hours after No. 303 was clear of the derailment and had started on its journey. And this the defendant contended, notwithstanding the fact that in the interim these employees had reached Portland, "a terminal," and the end of that run; had remained off duty at "a terminal" over six hours, and had been permitted and required to return to duty again and to leave "a terminal" in charge of No. 308, the carrier knowing full well that long before that train could reach Tacoma the service required of these employees would be over 16 hours in the aggregate.

In view of the fact that the record does not disclose a scintilla of evidence showing the least causal connection between the derailment at Lake View and the service required of the employees in question, but, on the contrary, affirmatively discloses the fact that such was the result of nothing more nor less than wanton neglect on the part of the carrier, plaintiff contends that the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted.

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